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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROY CLIFTON STERLING, Defendant and Appellant.	E031620 (Super.Ct.No. RIF097911) **OPINION**

APPEAL from the Superior Court of Riverside County. Russell F. Schooling, Judge. (Retired judge of the Mun. Ct. for the Southeast Jud. Dist. of L.A., assigned by the Chief Justice pursuant to art. VI, § 6, of the Cal. Const.) Affirmed as modified.

Anthony J. Dain, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Lilia E. Garcia, Supervising Deputy Attorney General, and Ivy B. Fitzpatrick, Deputy Attorney General, for Plaintiff and Respondent.

A jury found defendant guilty of possessing a counterfeit bill (Pen. Code, § 476).[1] The trial court thereafter found true that defendant had suffered two prior strike convictions (§§ 667, subds. (c) & (e), 1170.12, subd. (c)) and that defendant had served four prior prison terms (§ 667.5, subd. (b)). As a result, defendant was sentenced to a total term of 25 years to life in state prison. On appeal, defendant contends (1) the trial court erred in instructing the jury with CALJIC No. 17.41.1; (2) the trial court erred in denying his section 17, subdivision (b) motion to reduce his conviction to a misdemeanor; (3) his sentence constitutes cruel and/or unusual punishment under the federal and state Constitutions; and (4) his four prior prison term enhancements should have been stricken rather than stayed. We agree with the parties that defendant's four prior prison term enhancements should be stricken. We reject defendant's remaining contentions.

I

FACTUAL AND PROCEDURAL BACKGROUND

On June 26, 2001, at about 11:45 a.m., Riverside Police Detective Brian Dodson and Officer Kimberly Crutchfield were on routine patrol when they saw defendant standing near a 1980's-era Cadillac Coupe de Ville in the rear alley of an apartment complex. As they walked towards the alley, defendant moved away from the car and appeared to be trying to avoid the officers. When Detective Dodson approached him, defendant appeared very nervous and looked around in an agitated manner. Defendant initially made an untruthful statement about not being subject to a search. He

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[1] All future statutory references are to the Penal Code unless otherwise

[footnote continued on next page]

subsequently admitted being subject to a lawful search and arrest by law enforcement due to an unrelated matter.

Upon searching defendant, Detective Dodson found a black wallet containing photographs, paperwork, a business card of a mechanic, three $10 bills, and a $1 bill. The three $10 bills were folded in half and placed in the top corner of the wallet. Based on his experience and training, Detective Dodson determined that the $10 bills were counterfeit and the $1 bill was authentic. After Detective Dodson notified Officer Crutchfield that he had found counterfeit bills, defendant stated, "Yeah, those are mine. I was just holding them. I was just making it look like I had money." Defendant was thereafter arrested.

United States Secret Service Special Agent Lani Johnson Bretta examined the $10 bills found on defendant, and, based on her training and experience, testified the bills were counterfeit and of poor quality. Agent Bretta also stated that two of the counterfeit bills had the same serial number, while the third bill's serial number was only one digit off from the other two bills.

[footnote continued from previous page]
stated.

II

DISCUSSION

A. *CALJIC No. 17.41.1*

Defendant contend the trial court erred in instructing the jury with CALJIC No. 17.41.1[2] because it violates his right to a fair trial, it threatens the privacy and impartiality of jury deliberations, it infringes on the jury's right to freedom of expression and speech, it impinges on his right to a unanimous verdict, it has a chilling effect on the jurors, and it is essentially an antinullification instruction which violates his right to an impartial jury.

We reject defendant's contentions. Substantially similar and related arguments were recently considered and rejected by our Supreme Court in *People v. Engelman* (2002) 28 Cal.4th 436, 442-445 (*Engelman*). Accordingly, we reject defendant's constitutional challenges.

We observe, however, that the Supreme Court, exercising its supervisory powers, directed that the instruction not be given in future trials. (*Engelman*, *supra*, 28 Cal.4th at p. 449.) It reasoned that the instruction creates an inadvisable and unnecessary risk "of intrusion upon the secrecy of deliberations or of an adverse impact on the course of deliberations." (*Id*. at p. 445.) But here, as in *Engelman*, there is no indication that CALJIC No. 17.41.1 affected the jurors' deliberations in any way. Thus, defendant has

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[2] CALJIC No. 17.41.1, as given to the jury in the instant case, states as follows: "The integrity of a trial requires that the jurors at all times during their deliberations conduct themselves as required by these instructions. Accordingly, should it occur that any juror refuses to deliberate or expresses an intention to disregard the law or to decide the case based on penalty or punishment, or any other improper basis, it is the obligation of the other jurors to immediately advise the Court of this situation."

not shown that the instruction violated his constitutional rights in any of the claimed respects.

Defendant also argues that the instruction violated the jurors' freedom of speech and expression. We may assume, without deciding, that defendant has standing to raise this argument. (Cf. *Powers v. Ohio* (1991) 499 U.S. 400, 410-415.) The jurors' right to freedom of speech, however, must be balanced against the right to a fair trial. (*Allegrezza v. Superior Court* (1975) 47 Cal.App.3d 948, 951-952; *Younger v. Smith* (1973) 30 Cal.App.3d 138, 159-164; see *San Jose Mercury-News v. Municipal Court* (1982) 30 Cal.3d 498, 510, fn. 12.) For example, jurors do not have the right, as a matter of freedom of speech or otherwise, to inject outside influences into their deliberations. (See *Sheppard v. Maxwell* (1966) 384 U.S. 333, 351.) Jurors likewise do not have the right in their deliberations to disregard the law. (See *People v. Cline* (1998) 60 Cal.App.4th 1327, 1335 .) CALJIC No. 17.41.1 substantially promotes the right to a fair trial, which outweighs any incidental chilling effect on the jurors' already restricted freedom of speech during deliberations.

We conclude the trial court did not err by giving CALJIC No. 17.41.1.

B. *Failure to Reduce Current Offense to a Misdemeanor*

Defendant next contends the trial court abused its discretion when it denied his motion to reduce his current conviction for possession of counterfeit bills to a misdemeanor pursuant to section 17, subdivision (b). We disagree.

The trial court has broad discretion in sentencing. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) The decision whether to reduce a wobbler to a misdemeanor is one of the sentencing choices within the trial court's broad discretion. (§ 17, subd. (b).)

" . . . 'The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' [Citation.]" (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) A sentence will not be reversed simply because reasonable people might disagree with the trial court's decision. (*Ibid*.)

A trial court in deciding whether to exercise its discretion under section 17 should consider "'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.'" (*People v. Superior Court (Alvarez)*, *supra*, 14 Cal.4th at p. 978.) Further, a lower court must take into account "the defendant's criminal past and public safety . . . ." (*Id*. at pp. 981-982.) "The corollary is that even under the broad authority conferred by section 17[, subd.] (b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest 'exceeds the bounds of reason.' [Citations.]" (*Id.* at p. 978.)

We find no abuse of discretion here. The trial court considered the nature and circumstances of the present offense, observed defendant's demeanor during the course of the trial, and reviewed defendant's record before it denied defendant's section 17 motion. The court recognized its discretion but believed defendant's record was too lengthy, significant, and serious to reduce the current offense to a misdemeanor. That record reflects that defendant's criminal history spans more than 24 years. He has a total of eight prior convictions. He has been convicted of battery (§ 242), second degree

murder (§ 187), possession of phencyclidine (PCP) for sale (Health & Saf. Code, § 11378.5), twice for falsely representing himself to a peace officer (§ 148.9, subd. (a)), assault with a sawed-off shotgun (§ 245, subd. (a)(2)), disorderly conduct (§ 647, subd. (a)), and second degree burglary (§ 459). Defendant has incurred three serious felony convictions, repeatedly served time in county jail and state prison, and been given numerous opportunities to rehabilitate on parole and/or probation.

The foregoing reflects an individual steeped in crime unwilling to alter his ways although he had many opportunities to rehabilitate himself. On this record, we conclude defendant has failed to show that the trial court's decision was irrational or arbitrary. Although reasonable minds could possibly differ as to whether the circumstances of the crimes, defendant's criminal history, and his recent behavior justify reducing this charge to a misdemeanor, we cannot on this record justify substituting our judgment for that of the trial court.

Defendant, however, complains that the trial court "improperly relied too heavily" on his recidivist nature in reaching its conclusion to deny reducing his current offense to a misdemeanor. The record belies this contention. Although the trial court mentioned defendant's past criminal history several times, the record shows that the court considered several factors before exercising its discretion. The court considered the nature of the current offense, defendant's background (including the nature and frequency of his prior convictions and his ability to complete parole), the objectives of the three strikes law, society's interest in punishing recidivists, society's interest in preventing recidivists from committing new offenses, and achieving uniformity in sentencing. After a lengthy discussion with defense counsel and "soul-searching"

consideration, the trial court found the minor nature of the current offense was outweighed by defendant's background, his extensive criminal history, and society's interest in preventing future crime. In fact, defendant concedes the record demonstrates that the trial court considered other relevant factors before denying defendant's motion to reduce his current conviction to a misdemeanor.

The trial court, therefore, properly denied defendant's motion to reduce his current conviction to a misdemeanor.

C. *Cruel and/or Unusual Punishment*

Defendant also contends his sentence of 25 years to life for his current nonviolent offense for possession of counterfeit bills constitutes cruel and/or unusual punishment under both the federal and state Constitutions. We disagree.

"A sentence may violate the state constitutional ban on cruel and unusual punishment (Cal. Const., art. I, § 17) if '". . . it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity."' [Citation.]" (*People v. Thongvilay* (1998) 62 Cal.App.4th 71, 87-88, quoting *People v. Dillon* (1983) 34 Cal.3d 441, 478, quoting *In re Lynch* (1972) 8 Cal.3d 410, 424.) "In examining whether a sentence is cruel and unusual under California law, this court: (1) examines the 'nature of the offense and/or the offender, with particular regard to the degree of danger both present to society' [citation]; (2) compares the challenged punishment with punishments prescribed for more serious offenses in the same jurisdiction; and (3) compares the challenged punishment with punishments prescribed for the same offense in other jurisdictions [citation]." (*People v. Cline*, *supra*, 60 Cal.App.4th 1327, 1337, quoting *In re Lynch*, *supra*, 8 Cal.3d at p. 425.)

Our high court has held, however, that, provided a punishment is proportionate to the defendant's individual culpability ("intracase proportionality"), there is no requirement that it be proportionate to the punishments imposed in other similar cases ("intercase proportionality"). (*People v. Webb* (1993) 6 Cal.4th 494, 536; *People v. Mincey* (1992) 2 Cal.4th 408, 476; *People v. Miller* (1990) 50 Cal.3d 954, 1010.) Accordingly, it is permissible to base the determination of whether punishment is cruel and unusual solely on the offense and the offender. (*People v. Ayon* (1996) 46 Cal.App.4th 385, 399, disapproved on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10; see, e.g., *People v. Dillon*, *supra*, 34 Cal.3d at pp. 479, 482-488; *People v. Young* (1992) 11 Cal.App.4th 1299, 1308-1311; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1198-1200.)

Defendant asserts that the punishment is disproportionate because his current offense is a nonviolent crime. Although defendant characterizes his offense as nonviolent and relatively minor, his sentence was calculated on the basis of his recidivist behavior. (*People v. Cline*, *supra*, 60 Cal.App.4th 1327, 1338.) Here, the outstanding characteristic of both the offense and the offender is recidivism. Defendant has manifested a persistent inability to conform his conduct to the requirements of the law. As discussed in part II.B., *ante*, defendant's past criminal history is significant, extensive, and serious. He began the life of crime some 24 years ago, and includes violent and intolerable offenses. Probation interventions and parole supervisions have failed to dissuade defendant from continuing to commit crimes.

A sentence of 25 years to life based on such recidivism "is not constitutionally proscribed." (*People v. Stone* (1999) 75 Cal.App.4th 707, 715; accord, *People v.*

Martinez (1999) 71 Cal.App.4th 1502, 1512; *People v. Cline*, *supra*, 60 Cal.App.4th at pp. 1337-1338; *People v. Askey* (1996) 49 Cal.App.4th 381, 388; *People v. Ayon*, *supra*, 46 Cal.App.4th at p. 399; *People v. Cooper* (1996) 43 Cal.App.4th 815, 825-826.) This is true even where the present offense is nonviolent. (*Cline*, *supra*, at pp. 1337-1338; *Cooper*, *supra*, at p. 826.) "[Defendant] . . . was before the trial court as a career criminal who had preyed on society and failed to benefit from multiple incarcerations and periods of parole . . . ." (*Ayon*, *supra*, at p. 400.)

"Recidivism in the commission of multiple felonies poses a manifest danger to society justifying the imposition of longer sentences for subsequent offenses." (*People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630.) "Society is not only entitled to be protected from the depravity of those criminally inclined, but it is the first and highest duty of government to secure to its citizens the enjoyment of their lives and property against the unlawful aggression of the criminal class, who, if unrestrained, would despoil the law abiding both of life and property. When a person has proven himself immune to the ordinary modes of punishment, then it becomes the duty of government to seek some other method to curb his criminal propensities that he might not continue to further inflict himself upon law-abiding members of society. This, we think, may be done even to the extent of depriving him permanently of his liberty. . . .' [Citation.]" (*People v. Cooper*, *supra*, 43 Cal.App.4th 815, 827-828.)

A sentence of 25 years to life was not disproportionate to these particular offenses and offender. We therefore are not required to compare it to sentences imposed in California for more serious offenses, or in other jurisdictions for the same offense. Nevertheless, out of an excess of caution, we discuss these matters briefly.

With respect to sentences for other offenses in the same jurisdiction, defendant complains that he must serve a longer term than a person convicted of second degree murder. This argument has been repeatedly rejected: "[P]roportionality assumes a basis for comparison. When the fundamental nature of the offense and the offender differ, comparison for proportionality is not possible. The seriousness of the threat a particular offense poses to society is not solely dependent on whether it involves physical injury. Consequently, the commission of a single act of murder, while heinous and severely punished, cannot be compared with the commission of multiple felonies. [Citation.]" (*People v. Cooper*, *supra*, 43 Cal.App.4th at p. 826; accord, *People v. Martinez*, *supra*, 71 Cal.App.4th at p. 1512; *People v. Gray* (1998) 66 Cal.App.4th 973, 993; *People v. Ingram* (1995) 40 Cal.App.4th 1397, 1416, disapproved on other grounds in *People v. Dotson* (1997) 16 Cal.4th 547, 560, fn. 8; *People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1137.) It is illogical to compare a recidivist offense to a nonrecidivist offense (*People v. Cline*, *supra*, 60 Cal.App.4th at p. 1338); it is similarly illogical to distinguish a major recidivist offense from a minor recidivist offense. What is crucial in both instances, and what makes the punishment in both instances not unconstitutionally disproportionate, is their shared recidivism.

Finally, with respect to sentences for the same offense in other jurisdictions, "California's scheme is part of a nationwide pattern of statutes calling for severe punishments for recidivist offenders. [Citation.]" (*People v. Cline*, *supra*, 60 Cal.App.4th at p. 1338.) The fact "[t]hat California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in

lockstep with other states in fashioning a penal code. It does not require 'conforming our Penal Code to the "majority rule" or the least common denominator of penalties nationwide.' [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct." (*People v. Martinez*, *supra*, 71 Cal.App.4th at p. 1516, quoting *People v. Wingo* (1975) 14 Cal.3d 169, 179.)

Relying on the Ninth Circuit cases of *Andrade v. Attorney General of the State of California* (9th Cir. 2001) 270 F.3d 743[3] and *Brown v. Mayle* (9th Cir. 2002) 283 F.3d 1019, defendant also contends his sentence for possession of counterfeit bills constitutes cruel and unusual punishment under the federal Constitution. We again disagree.

This court recently disagreed with these Ninth Circuit decisions, holding that they were wrongly decided because, "when reviewing a recidivist sentence for proportionality, the recidivist sentence must be grossly disproportional to the criminal, not just the 'triggering' felony." (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1431.) A similar conclusion was reached by Division One of this court in *People v. Mantanez* (2002) 98 Cal.App.4th 354. In other words, this court continues to follow established federal and state precedent in deciding whether a particular sentence is unconstitutionally cruel and unusual, including consideration of the recidivist's prior criminal record.

The hurdles defendant must surmount to demonstrate cruel and unusual punishment under the federal Constitution are, if anything, higher than under the state Constitution. (See generally *People v. Cooper*, *supra*, 43 Cal.App.4th at pp. 819-824,

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[3] We note that on April 1, 2002, the United States Supreme Court granted certiorari in *Andrade*, *supra*, 270 F.3d 743, sub nom. *Lockyer v. Andrade* (2002) ___ U.S. ___ [122 S.Ct. 1434, 152 L.Ed.2d 379].

and cases cited.) In *Rummel v. Estelle* (1980) 445 U.S. 263, the Supreme Court upheld a sentence under a Texas recidivist statute of life with the possibility of parole for obtaining $120.75 by false pretenses. The defendant's previous offenses consisted of fraudulent use of a credit card to obtain goods and services worth $80 and passing a forged check in the amount of $28.36. Our defendant's prior offenses are far more serious. Accordingly, his sentence passes muster under the federal Constitution.

D. *Four Prior Prison Term Enhancements*

Lastly, defendant contends, and the People correctly concede, that the trial court erred by imposing, then staying, his four prior prison term enhancements (§ 667.5, subd. (b)). We agree. Such enhancements must be imposed or stricken, but may not be stayed. (*People v. Jones* (1993) 5 Cal.4th 1142, 1153; *People v. Johnson* (2002) 96 Cal.App.4th 188, 209.) Accordingly, the four prior prison term enhancements must be stricken. The abstract of judgment and the trial court's minute order should be corrected accordingly. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185-186.)

III

DISPOSITION

The judgment is hereby modified by striking defendant's four prior prison term enhancements. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect this modification and to forward a certified copy of the

amended abstract of judgment to the Director of the Department of Corrections. (§§ 1213, 1216.) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

McKINSTER
Acting P.J.

WARD
J.